No. [illegible]

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Security-First National Bank of Los Angeles, as Executor of the Will of Benjamin Harrison Sheldon, Mae Sheldon, and [illegible],

Appellants and Cross-Appellees,

vs.

[illegible], as Administrator of the Estate of Walter [illegible], Deceased,

Appellees and Cross-Appellants.

OPENING BRIEF OF APPELLANT MAE SHELDON.

[illegible],
[illegible],
Los Angeles 5, California,
Attorney for Appellant Mae Sheldon.

[illegible]

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No. 18174

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Security-First National Bank of Los Angeles, as Executor of the Will of Benjamin Harrison Sheldon; Mae Sheldon; and Robert Hohly,

Appellants and Cross-Appellees,

vs.

Eva S. Lutz, as Administratrix of the Estate of Walter A. Lutz, Deceased,

Appellees and Cross-Appellants.

OPENING BRIEF OF APPELLANT MAE SHELDON.

Statement Showing Jurisdiction.

This is the second appeal in the above-entitled matter. The opinion of the United States Circuit Court of Appeals upon the first appeal was reported in 297 F. 2d 160. Jurisdiction is founded upon diversity of citizenship. The decedent, Walter A. Lutz, was a citizen of the State of Washington, and defendants are citizens of the State of California. The amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs. (28 U. S. C. Sec. 1332.)

The facts involved in the instant case are correctly summarized and stated in the first opinion. (297 F. 2d 160.)

During the pendency of this matter the plaintiff, Walter A. Lutz, died and his wife, Eva S. Lutz, as Administratrix of the Estate of Walter A. Lutz, Deceased, has been substituted as the plaintiff herein.

Statement of Case.

In order to avoid needless repetition, Appellant Mae Sheldon joins in and adopts the Statement Showing Jurisdiction and Summarizing Prior Proceedings and Summary Statement of the Case as set forth in the Opening Brief of Security-First National Bank of Los Angeles, as Executor of the Will of Benjamin Harrison Sheldon. In addition to the foregoing adoption by reference, this Appellant will, at the risk of some repetition, review the facts and proceedings having a direct and pertinent bearing upon the personal judgment rendered against Appellant Mae Sheldon.

Following the trial in 1959 before the court without a jury, the court gave notice of the manner in which it proposed to enter judgment, and directed that proposed Findings of Fact, Conclusions of Law and Judgment be prepared in accordance therewith by Lutz. With respect to the liability of Mae Sheldon the order read:

> "That it appearing to the Court that plaintiff has not sustained the burden of establishing, by a preponderance of the evidence, the claims of actual fraud asserted by plaintiff, but that plaintiff has fully established, by a clear preponderance of the evidence, the claims of conversion and constructive fraud and negligence asserted by plaintiff, accordingly findings of fact, conclusions of law and judgment for damages and interest and costs are ordered in favor of plaintiff as follows:

(a) Against all defendants, other than defendant Robert Hohly, for conversion;

(b) Against defendants May Sheldon and Robert Hohly for constructive fraud; and

(c) Against defendant Robert Hohly for negligence.

(6) That the amount of the judgment so awarded plaintiff as against each of the defendants shall be for the sum of damages and interest claimed for conversion in plaintiff's closing memorandum filed August 4, 1959, plus plaintiff's costs.

(7) That plaintiff's attorneys will serve and lodge with the Clerk, within ten days, findings of fact, conclusions of law and judgment as herein ordered, to be settled pursuant to Local Rule 7.

November 6, 1959.

/s/ WM. C. MATHES,
United States District Judge."

[Tr. pp. 179-180.]

The memorandum filed by plaintiff's attorneys pursuant to Local Rule 7 claimed the total value of the shares of stock and debentures converted to be $25,217.-07 and requested judgment for interest thereon at the rate of 7% per annum from the date of conversion, to wit, May 8, 1956, to December 7, 1959, in the amount of $5,442.68, resulting in a total judgment of $31,566.25. Thereafter, Findings of Fact, Conclusions of Law and Judgment were signed and filed herein. Judgment was rendered in favor of the plaintiff against all of the defendants in the sum of $31,566.25. [Tr. pp. 225-226.]

Thereafter and pursuant to motions filed by the parties to amend or modify the Findings of Fact, Con-

clusions of Law and Judgment, the trial court made an order reading in part as follows:

> "That plaintiff's motion, filed December 21, 1959, to amend and supplement the findings of fact entered December 10, 1959, is hereby granted to the extent that finding of fact numbered 41 now appearing at lines 2-4 on page 20 of the findings of fact, conclusions of law and judgment is hereby amended to read as follows:
>
> 'Plaintiff has been damaged in the sum of $30,-447.38 to June 8, 1959, with interest at the rate of $4.90 per day thereafter until the entry of judgment, for the conversion of the stock identified in finding 37 above, and in the additional sum of $15,000 for his detriment suffered and the benefits and advantages obtained by defendant Mae Sheldon as a result of her constructive fraud.'" [Tr. p. 237.]

and made a new judgment as follows:

> "It is Hereby Ordered, Adjudged and Decreed:
>
> That the plaintiff, Walter A. Lutz, do have and recover judgment against defendants Mae Sheldon, Robert Hohly, James G. Thompson and Flamingo Trailer Manufacturing Corporation, a corporation, and against defendant Security-First National Bank of Los Angeles, as Executor of the Will of Ben H. Sheldon, Deceased, payable by said bank in the due course of administration of said estate, for the sum of $31,566.45; and against defendant Mae Sheldon for the additional sum of $15,000 compensatory damages; and against defendant Robert Hohly for the additional sum of $15,000 exemplary damages; and for plaintiff's costs of suit herein incurred, as taxed." [Tr. p. 238.]

By this judgment the personal liability of Mae Sheldon was increased in the additional sum of $15,000.

With respect to this additional judgment, the United States Court of Appeals in its opinion (297 F. 2d 165) stated:

> "Judgment against Mae Sheldon in the additional sum of $15,000.00 must be set aside and this matter remanded for further findings with reference to the reasonable value of services rendered and expenses properly incurred."

After proceedings on remand, the trial court made its Supplemental Findings of Fact and Amended Conclusions of Law and Judgment Following Remand, which judgment, with respect to the personal liability of Mae Sheldon, reads in part as follows:

> "REVISED JUDGMENT
>
> In accordance with the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:
>
> The plaintiff, Walter A. Lutz, do have and recover judgment against the defendants as follows:
>
> (1) As against the Security First National Bank, as Executor of the Will of Ben H. Sheldon, Deceased, for conversion, in the sum of $31,566.25, together with interest thereon at seven per cent (7%) per annum from December 10, 1959, to the date of payment, to be paid in the due course of administration of such Estate;
>
> (2) As against Mae Sheldon, for conversion and constructive fraud, in the sum of $55,000, less any *principal* sum actually received by plaintiff pur-

suant to (1) of this judgment, by way of mitigation;

(3) As against Robert Hohly, for constructive fraud and negligence, in the sum of $55,000, less any *principal* sum actually received by plaintiff pursuant to (1) of this judgment, by way of mitigation;

(4) As against all of such defendants, for plaintiff's costs of suit incurred in this Court, and taxed in the sum of $............

April 26, 1962.

/s/ WM. C. MATHES,
United States District Judge"

[Supplemental Transcript of Record after Remand, p. 609.]

By the foregoing judgment, the additional liability of Mae Sheldon, which had been fixed at $15,000 in the second judgment entered by the court, was further increased. The record [Tr. p. 181] indicates that the principal amount of the judgment for conversion was $25,217.07 and if this be the sum referred to by the trial court when it uses the language in the above judgment "less any principal sum actually received by plaintiff pursuant to (1) of this Judgment by way of mitigation", then the additional judgment against Mae Sheldon has been increased from $15,000 to $29,782.93 ($55,000.00 less $25,217.07).

In summary, the foregoing shows that the trial court has now rendered three separate judgments, each punishing Mae Sheldon by increasing the amount of the personal judgment rendered against her, while the judgment for conversion has remained constant.

From the standpoint of Mae Sheldon, the questions involved are:

1. Contrary to the mandate of the United States Court of Appeals, the trial court, after remand, again failed to give consideration to or make allowances for the advances of $57,200.00 made by Ben Sheldon to the partnership.

2. The determination of the trial court of the reasonable value of the services of Ben Sheldon to the partnership and to the corporation is not sustained by the evidence.

3. The determination of the trial court that the Sheldons wrongfully obtained in excess of $170,000 from the corporation and partnership is not sustained by the evidence.

4. The inclusion by the trial court of projected profits of the trailer business in fixing damages is erroneous.

Specification of Errors.

The trial court erred in the following particulars:

1. The finding of the trial court with respect to the reasonable value of the services rendered by Ben Sheldon to the partnership and corporation is not sustained by the evidence.

2. The supplemental finding of the trial court that the defendants have never attempted to substantiate or prove the propriety of the expenses paid by Ben Sheldon by the corporation is not sustained by the evidence.

3. The construction placed by the trial court upon Paragraph 23 of the Partnership Agreement as set forth in Paragraph 2 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p.

601, lines 15-22] is not supported by the evidence and is contrary to the law of the case established on the first appeal.

4. The additional finding set forth in Paragraph 3 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 601, line 23, to p. 602, line 2] is not sustained by the evidence and is contrary to the law of the case established on the first appeal.

5. The additional finding of fact set forth in Paragraph 4 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 602, lines 3-5] is not sustained by the evidence and is contrary to the law of the case established on the first appeal.

6. The additional finding of fact set forth in Paragraph 5 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 602, lines 6-16] is not sustained by the evidence.

7. The additional finding of fact set forth in Paragraph 6 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 602, lines 17, to p. 603, line 5] is not sustained by the evidence.

8. The additional finding of fact set forth in Paragraph 7 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 603, lines 6-21], is not sustained by the evidence.

9. The additional finding of fact set forth in Paragraph 8 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 603, lines 22-29] is not sustained by the evidence.

10. The additional finding of fact set forth in Paragraph 9 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 603, line 30, to p. 604, line 6] is not sustained by the evidence.

11. The additional finding of fact set forth in Paragraph 10 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 604, lines 7-15] is not sustained by the evidence, and is contrary to the law of the case established on the first appeal.

12. The additional finding of fact set forth in Paragraph 11 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 604, lines 16-28] is not sustained by the evidence, and is contrary to the law of the case established on the first appeal.

13. The additional finding of fact set forth in Paragraph 12 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 604, line 29, to p. 606, line 1] is not sustained by the evidence and is contrary to the law of the case established on the first appeal.

14. The additional finding of fact set forth in Paragraph 14 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 606, lines 2-6] is not sustained by the evidence.

15. The additional finding of fact set forth in Paragraph 15 of the Supplemental Findings of Fact [Supplemental Transcript of Record after Remand, p. 606, lines 7-13] is not sustained by the evidence.

ARGUMENT.

A. In Determining the Amount of the Judgment for Conversion the Trial Court Failed to Follow the Mandate of the United States Court of Appeals and Failed to Balance the Equities.

1. Preliminary Statement.

After the decision upon the first appeal, the parties convened before the trial court on February 19, 1962, for such further proceedings in the trial court as were necessary to carry out the instructions of the United States Court of Appeals as set forth in its opinion.

The Reporter's Transcript of the proceedings on February 19, 1962, amply demonstrates that the trial court failed to understand the plain language in the opinion of the United States Court of Appeals. At least the record shows that the trial court professed to find much that was uncertain in the opinion of the court of appeals. The trial court's uncertainty and confusion might well have been occasioned by the fact that the trial court had not read the briefs which had been filed with the United States Court of Appeals. [See p. 79, Rep. Tr. Feb. 19, 1962, lines 3-5]. It therefore could not know the grounds of the appeal, the specifications of errors set forth in the briefs, and the arguments thereon, to which the opinion of the court of appeals was responsive. Indeed, this same confusion and uncertainty has been carried over into the judgment from which this appeal has been taken, as the trial court makes the Supplemental Finding of Fact in paragraphs 1(a), 1(b) and 1(c) [Supplemental Transcript of Record after Remand, page 600] on one interpretation of the mandate of the court of appeals, and

then makes Supplemental Findings of Fact 2 to 16, inclusive, on another and allegedly different interpretation of the mandate of the court of appeals. The revised judgment then rendered is totally at variance with the Supplemental Findings of Fact in paragraphs 1(a), 1(b) and 1(c).

Thus, the confusion already inherent in plaintiff's amended complaint, the pre-trial conference order (of which the trial court justly complains) is compounded by the Supplemental Findings of Fact and the revised judgment from which this appeal is taken.

We find this elementary statement of law in American Jurisprudence:

> "After a case has been determined by the reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former. The mandate of the reviewing court is binding on the lower court and must be strictly followed and carried into effect according to its true intent and meaning, as determined by the directions given by such reviewing court. Public interest requires that litigation shall come to an end speedily, so that when a cause has been tried to judgment, and the merits of the trial determined upon appeal, the trial court, upon remittitur, has no power but to obey the judgment of the appellate court." (3 Am. Jur. pp. 730-731.)

We trust that this litigation may finally be disposed of on this appeal notwithstanding the confusion which exists in the record.

2. The Trial Court Again Erred in Failing to Credit Against the Judgment for Conversion the Reasonable Value of the Services Rendered by Ben Sheldon.

Upon the first appeal in this matter the opinion of the United States Court of Appeals stated that as to the amount of the judgment for conversion the appellants were entitled to credits in the sum of $57,200 advanced by Sheldon to the partnership and the reasonable value of the services rendered by Sheldon to the partnership.

Contrary to this opinion the trial court on proceedings after remand again rendered judgment for conversion in exactly the same amount as it had rendered upon the judgment from which the first appeal was taken.

This particular matter is argued at length in the opening briefs of Robert Hohly and of the Security-First National Bank of Los Angeles, as Executor of the Will of Benjamin H. Sheldon, Deceased. Appellant Mae Sheldon joins in and adopts as a part of this brief the arguments and points and authorities set forth and contained in the opening briefs of Robert Hohly and of said bank, and will hereinafter in this brief attempt to supplement their argument and avoid needless repetition.

a. *The Trial Court Erred in Its Interpretation of the Partnership Agreement.*

Without any evidence whatsoever having been taken by the court during the proceedings after remand, the trial court nevertheless made a finding construing paragraph 23 of the partnership agreement and found

> "that the partners intended that B. H. Sheldon should not be paid any salary unless and until a

> definite agreement had been made to that effect. B. H. Sheldon never asked for such agreement and no agreement was ever made." [Supplemental Transcript of Record after Remand, p. 601.]

Again, without any evidence whatsoever having been introduced during the proceedings after remand, the trial court found that "Sheldon disclaimed and waived any right to salary, July 1, 1954 to March 3, 1956." [Supplemental Transcript of Record after Remand, p. 602.]

Such findings were made notwithstanding the plain language of the opinion of the United States Court of Appeals which specifically held that under the partnership agreement Sheldon was entitled to receive the reasonable value of his services.

With respect to the additional judgment against Mae Sheldon, the provision for remand in the opinion of the United States Court of Appeals was definite and unambiguous. "Judgment against Mae Sheldon in the additional sum of $15,000.00 must set aside and this matter remanded for further findings with reference to the reasonable value of services rendered and expenses properly incurred." (297 F. 2d 165.)

While we do not think we are again compelled to argue this point, we nevertheless will again point out that Paragraph 23 of the Partnership Agreement [Tr. pp. 65-66] specifically provided that "the General Partners shall be paid such reasonable compensation for services in the operation of the business * * *."

Ben Sheldon died March 3, 1956. From July 1, 1954, to the date of his death he rendered valuable services to the partnership and to the corporation.

Subsequent to his death, Walter A. Lutz filed this action and for relief appealed to the court as a court of equity. The time-honored maxim "He who seeks equity must do equity" is clearly applicable to the circumstances of this case. The construction of the trial court of Paragraph 23 does violence to this maxim. Furthermore, it is contrary to elementary principles of law.

Where a partnership agreement clearly contemplates the payment of salary to one or more partners but no amounts are specified, the courts have held that the contracting partners intended the payment of "reasonable" salaries. Thus in *Koehler v. Hunter,* 166 Ark. 27, 265 S. W. 972, where a written partnership agreement provided that a partner should have full management and control of the business and that he should draw a salary after the actual operation of the plant had begun, and the agreement did not specify the amount of the salary, the court held that such managing partner should have been allowed a reasonable salary for his services after the plant had commenced to operate and remanded the case for further proceedings in order to allow either party to introduce evidence as to the reasonable value of the services rendered.

In *Kalez v. Miller,* 20 Wash. 2d 362, 147 P. 2d 506, the trial court in decreeing the dissolution and adjusting accounts of an association of doctors, which purported to be a corporation but which was treated as a partnership because the purpose of the corporation was not a legitimate corporate enterprise, gave effect to employment contracts between the doctors and the corporation and allowed a member of the association credit

for a reasonable salary for the purpose of determining the profits of the firm. This determination was upheld and approved on appeal even though the reasonable salary allowed was greater than the specific figure provided by the employment contract.

In *Jones v. Jones,* 254 Ky. 475, 71 S. W. 2d 999, the partnership agreement provided that one partner should have the acting management of the business and should be paid a reasonable sum for his services. The court there upheld a determination of the reasonable value of the services rendered by the managing partner.

In *Strattan v. Tabb,* 8 Ill. App. 225, it was held that where an agreement for special compensation to one co-partner did not fix the amount of such compensation that the partner was entitled to the reasonable value of his services to the firm.

In *Sears v. Munson,* 23 Iowa 380, without deciding whether the relationship between the partners was a partnership, the court concluded that there had been a definite understanding or agreement that one member of the association should be paid, and held that in the absence of any agreement on a specific amount, the law would fix the amount at what was reasonable.

b. *The Trial Court Erred in Disallowing as a Credit Against the Judgment for Conversion the $57,200.00 Advanced by Sheldon to the Trailer Business.*

This point, too, has been argued well and thoroughly in the opening briefs of Robert Hohly and the Security-First National Bank of Los Angeles, as Executor of the Will of Ben H. Sheldon, Deceased, and Appellant Mae

Sheldon joins in and adopts as a part of this brief the argument and points and authorities set forth on this point in the said opening briefs. The additional remarks are intended merely to supplement the argument of Robert Hohly and said bank.

Supplemental Findings of Fact 10 and 11 [Supplemental Transcript of Record after Remand, p. 604] relating to the advance of $57,200.00 are totally unsupported by the evidence. During the proceedings after remand no further evidence whatsoever was introduced by the parties on this matter. Furthermore, this matter was argued at length on the first appeal in the briefs filed by both Appellants and Appellees, and the opinion of the United States Court of Appeals rightfully decided this matter adverse to the Appellee. This matter was again argued by the Appellees in their petition for rehearing and was again rejected by the court of appeals. The trial court's above mentioned Supplemental Findings 10 and 11 are a re-statement of facts and argument already made by Appellee on the first appeal and are contrary to the law of the case.

c. *Summary.*

It is respectfully submitted that contrary to the express provisions of the opinion of the United States Court of Appeals the trial court again erred in its judgment for conversion by failing to give Sheldon credit for the reasonable value of his personal services rendered to the partnership and by failing to give Sheldon credit for $57,200.00 loaned to the partnership. These were two of the principal points urged on appeal by the Appellants. These points were thoroughly covered in the briefs of all parties, were argued extensive-

ly by all counsel at the time the matter was orally argued before the United States Court of Appeals, and in our opinion the law of this case as established by the opinion of the United States Court of Appeals upon this first appeal required the trial court to determine the reasonable value of services rendered by Sheldon to the partnership and to diminish the judgment for conversion by allowing a credit for the reasonable value of such services and the $57,200.00 loaned by Sheldon to the partnership.

Appellant Mae Sheldon approves the computation contained in the argument of Robert Hohly and of the Security-First National Bank of Los Angeles, as Executor of the Will of Ben H. Sheldon, Deceased, and submits that the judgment for conversion should be reduced to the amount computed and set forth in said argument of said bank and Robert Hohly.

B. The Judgment Against Mae Sheldon in the Sum of $55,000.00 Is Not Sustained by the Findings of Fact or the Evidence.

1. Introductory.

The second judgment rendered by the trial court and from which the first appeal was taken provided as follows:

> "It is Hereby Ordered, Adjudged and Decreed:
>
> That the plaintiff, Walter A. Lutz, do have and recover judgment against defendants Mae Sheldon, Robert Hohly, James G. Thompson and Flamingo Trailer Manufacturing Corporation, a corporation, and against defendant Security-First National Bank of Los Angeles, as Executor of the Will of Ben H. Sheldon, Deceased, payable by said bank in the due course of administration of said

estate, for the sum of $31,566.45; and against defendant Mae Sheldon for the additional sum of $15,000 compensatory damages; * * *."

The judgment now appealed from, being the third judgment rendered by the trial court, adjudges:

"The plaintiff, Walter A. Lutz, do have and recover judgment against the defendants as follows:

(1) As against the Security First National Bank, as Executor of the Will of Ben H. Sheldon, Deceased, for conversion, in the sum of $31,-566.25, together with interest thereon at seven per cent (7%) per annum from December 10, 1959, to the date of payment, to be paid in the due course of administration of such Estate;

(2) As against Mae Sheldon, for conversion and constructive fraud, in the sum of $55,000, less any principal sum actually received by plaintiff pursuant to (1) of this judgment, by way of mitigation * * *." [Supplemental Transcript of Record after Remand, p. 609.]

The manner in which the trial court reached its last judgment against Mae Sheldon is not entirely clear. No evidence whatsoever was introduced during the proceedings before the trial court after remand following the decision of the United States Court of Appeals which would in the slightest degree increase the additional liability of Mae Sheldon for $15,000 expressed in the second judgment. Instead, all the evidence introduced upon the matter relating to the reasonable value of the services of Ben Sheldon should have reduced the amount of the judgment theretofore rendered against her for conversion. But, as pointed out

above in this brief, the judgment for conversion against Mae Sheldon and the Security-First National Bank was again fixed in the identical amount as set forth in the second judgment which was appealed from and set aside. This judgment for conversion was in the principal amount of $25,217.07 and interest thereon from the date of the said conversion to December 10, 1959, which brought the principal amount to $31,566.25.

The judgment in the sum of $55,000.00 against Mae Sheldon may be diminished by any "*principal* sum actually received by plaintiff pursuant" to the judgment rendered against the Security-First National Bank, as Executor of the Will of Ben H. Sheldon, Deceased, by way of mitigation. The principal amount of the judgment for conversion was $25,217.07. [Tr. p. 181.] When this is subtracted from the amount of $55,000.00, we readily see that the trial court has now rendered judgment against Mae Sheldon for an additional sum of $29,782.93 ($55,000.00 less $25,217.07). If we regard the word "principal sum" as used in the judgment of the court to mean the sum of $31,566.25, then the additional judgment against Mae Sheldon would be $23,433.75. We submit that this judgment is contrary to the law of the case as determined by the United States Court of Appeals in its opinion on the first appeal, and that the Findings of Fact and Conclusions of Law purporting to justify this judgment are not substantiated by the evidence.

The additional judgment against Mae Sheldon in the sum of $15,000 from which the first appeal was taken was based upon the additional detriment suffered by Walter Lutz and benefits and advantages obtained by Mae Sheldon as a result of her constructive fraud.

In its opinion the United States Court of Appeals stated:

> "It does appear that Sheldon received salary and expenses from the corporation. If consent to incorporation, executed by Lutz, is to be regarded as equitably set aside, then some question may well be raised as to the reasonable value of the services rendered by Sheldon and the amount of compensation to which he was entitled; and as to whether additional benefit was received to which the Sheldons can show no equitable right." (297 F. 2d 165.)

The judgment against Mae Sheldon in the additional sum of $15,000 was then set aside and the matter remanded for further findings with reference to the reasonable value of services rendered and expenses properly incurred.

2. The Judgment in the Sum of $55,000 Is Not Sustained by the Findings of Fact Relating to Alleged Secret Profits and Unjust Enrichment.

After the proceedings upon remand and by its Supplemental Finding of Fact 12 [Supplemental Transcript of Record after Remand pp. 604-605] the trial court found that the Sheldons had obtained the following secret benefits from the partnership and corporation:

(a) $80,352.42 in profit-sharing salaries;

(b) $14,814.00 in unaccounted-for expenses;

(c) $11,161.33 profit on the GSA contract;

(d) The shifting of $78,571.88 oil losses incurred by Sheldon and recorded upon the trailer venture's records;

(3) The deficiency between the Sheldons' capital contribution obligation and their actual investment.

Said Finding 12 is not sustained by the evidence.

Appellant Mae Sheldon will discuss each item of alleged secret benefit separately.

All the foregoing matters were included in the original Findings of Fact made by the court in support of the judgment from which the first appeal was taken. Such findings are set forth in the Appendices annexed hereto.

The profit-sharing salaries in the sum of $80,354.42 was included in Finding 35 [Tr. p. 215] and Finding 39 [Tr. pp. 218-220]. Appendix 5.

The unaccounted-for expenses in the sum of $14,814.00 was likewise in Finding 35 [Tr. p. 215] and Finding 39. [Tr. pp. 218-220.] Appendix 5.

The $11,161.33 profit on the GSA contract was included in Finding 39. [Tr. pp. 218-220.] Appendix 2.

The oil losses of $78,571.88 was the subject matter of subparagraph 6 of Finding 39 [Tr. p. 218] and Finding 36(f)(3) [Tr. p. 216.] Appendix 9.

All of the foregoing matters were argued in the briefs of the respective parties and considered by the court on the first appeal.

However, it seems advisable to again reiterate and restate the facts and arguments heretofore made, and Appellant Mae Sheldon will discuss these matters in the order followed in the reply brief of Appellant Mae Sheldon filed on the first appeal:

(a) *The Profit On the GSA Contract ($11,161.33).*

Other than the above-quoted Supplemental Finding of Fact 12, the other Findings of Fact which relate in any way to this item are set forth in Appendix 2 annexed hereto. The principal evidence produced in the transcript relating to this item is likewise set forth in Appendix 3 annexed hereto and may be summarized as follows:

A government contract for the manufacture of trailers was obtained by Western Mobile Homes Distributors Corporation. During the performance of this contract the limited partnership, B. H. Sheldon Co. was formed and succeeded to the business of Western Mobile Homes Distributors Corporation. The partnership completed the contract for Western Mobile Homes Distributors Corporation and Western Mobile Homes Distributors Corporation collected the proceeds from the Government, retaining 5% of the sales to the Government under the contract for the period from June 1, 1954, to the completion of the contract. The net profit from the contract amounted to $11,161.33 and on January 17, 1955, Western Mobile Homes Distributors Corporation drew a check for this amount to B. H. Sheldon, who in turn deposited this sum in the bank account of the limited partnership and said amount was credited to capital account of B. H. Sheldon and Mae Sheldon. It is clear that the entire sum of $11,161.33 went into the bank account of the limited partnership.

The sole question involved in connection with this item was whether all or any part of this sum should have been credited to the capital account of B. H. Sheldon and Mae Sheldon. We submit that since the

entire funds went into the bank account of the limited partnership and no part thereof was ever withdrawn and paid out to B. H. Sheldon or Mae Sheldon that the only significance of this transaction is the effect, if any, that it has upon the contentions of the Estate of B. H. Sheldon, deceased, and Mae Sheldon that upon the incorporation of the partnership the general partners were entitled to a greater percentage than 60% of the shares and debentures issued for the transfer of the assets of the partnership. But since the trial Court has held that the general partners were entitled to no increase above 60% in their share of the corporation and has rendered a judgment for the conversion of shares and debentures to which plaintiff was entitled, any damage suffered by the plaintiff has been fully compensated for and covered by the judgment for conversion.

The said sum of $11,161.33 though credited to the capital account of the general partners was not included in the sum of $57,200.00 which was loaned by Sheldon to the trailer business. (See Appendix 4.)

To summarize the foregoing, Appellant Mae Sheldon contends:

(a) That said sum of $11,161.33 was deposited in the bank account of the partnership and has remained there.

(b) That no part of said sum was ever "siphoned off from the partnership or corporation into the pockets of the Sheldons" so as to make her liable as a constructive trustee.

(c) That any damage which might have resulted from this transaction to the plaintiff Lutz was fully compensated for in the judgment for conversion.

(b) *Expense Allowance $14,814.00.*

Other than the above-quoted Supplemental Finding of Fact 12, the Findings of Fact relating to this item are set forth in Appendix 5 annexed hereto, and the evidence in the record relating to this item (excluding the evidence adduced on proceedings after remand) is set forth in Appendix 6 annexed hereto. Such evidence, including the evidence set forth in the Reporter's Transcript of the proceedings on March 19, 1962, may be briefly summarized as follows:

Exhibit 207 [Tr. 1110] prepared by the witness Donald R. Villee itemizes the expenses paid to Ben Sheldon, as follows:

"Expense Allowances:	
September 9, 1954	$ 500.00
August 9, 1954	100.00
December 23, 1954	2,214.00
March 17, 1955	2,000.00
10 Months at Rate of $1000 per month	10,000.00
	$14,814.00

Mr. Vilee testified that he included the foregoing sums in his statement of known benefits [Ex. 207] because "I did not see any documents that would substantiate that there were any business expenses in that period sustained by Mr. Sheldon or Mrs. Sheldon", and "also by reason of the fact that they were in round thousand amounts per month." He examined the minutes of the corporation and "did not see anything therein about expenses."

After remand, the witness Merryfield testified [Rep. Tr. March 19, 1962, pp. 14-28] that he worked with

Ben Sheldon every day; that Ben Sheldon was the chief executive officer of the company; that Ben Sheldon handled the sales to distributors and dealers entirely; that Ben Sheldon negotiated the contracts with the dealers; that he entertained the dealers when they called at the plant.

From the foregoing it is clear that there is no evidence whatsoever that the sums so paid to Ben Sheldon were used for other than business purposes. Mr. Villee himself testified as follows:

> "Q. Do the books and records of the corporation reflect that those expense allowances were utilized by Mr. Sheldon or Mrs. Sheldon for non-business purposes? A. No, they do not reflect that they were not used for business purposes." (Appendix 6.)

From the nature of the duties performed by Ben Sheldon it is obvious that from time to time he would be called upon to travel, to entertain and otherwise incur out-of-pocket expenses expected of the chief executive officer of the largest trailer manufacturing business on the west coast.

We submit that the evidence falls far short of sustaining a judgment against Mae Sheldon for 9% of the expense allowances drawn by her deceased husband.

(c) *Salaries Recorded $80,352.42.*

From February 1, 1955 to May 8, 1956 the following salaries were paid to Ben Sheldon and Mae Sheldon by the corporation:

February 28, 1955 (1 month) $4,776.07 to Ben Sheldon

February 29, 1956 (12 months) $72,076.36 to Ben Sheldon

May 1956 (2 months) $3,500.00 to Mae Sheldon

Total $80,352.42

The various Findings of Fact relating to the foregoing matter are set forth in Appendix 7 annexed hereto. The principal evidence in the transcript filed on the first appeal relating to the reasonable value of these services is set forth in Appendix 8 annexed hereto.

After remand, the proceedings held on March 19, 1962, were primarily concerned with testimony relating to the reasonable value of the services rendered by Ben Sheldon. This testimony has been thoroughly summarized in the opening briefs of Robert Hohly and the Security-First National Bank.

For our purposes, we again here set forth the testimony of the three witnesses as to the reasonable value of the services for the thirteen-month period February 1, 1955, to March 3, 1956, for which Ben Sheldon was paid $76,852.43.

James Harner	$70,000
Page Galsan	$77,000
Robert Hohly	$70,000 to $90,000

If we accept the lowest opinion of $70,000, then Ben Sheldon was overpaid $6,852.43 and Walter Lutz suffered a detriment of $616.72—9% of said sum.

However, the Supplemental Findings of Fact made by the trial court are entirely unsupported by the evidence.

The opening briefs of Robert Hohly and the Security-First National Bank have adequately demonstrated this fact. We agree with and adopt their argument.

No testimony was introduced with respect to the reasonable value of the services rendered by Mae Sheldon.

On March 5, 1956, Mae Sheldon was elected president of the corporation and her salary was fixed by the board of directors at $3,500.00 per month [Tr. 722, 723]. She served as president until her resignation on May 9, 1956, and during her employment spent every working day at the plant [Tr. 770]. She was paid $3,500.00 for the two month period of her service.

The foregoing record does not sustain the trial court's findings that Ben Sheldon and Mae Sheldon were unjustly enriched in the sum of $80,352.42.

(d) *Shifting of $78,571.88 Oil Losses.*

All the Findings of Fact relating to this item are set forth in Appendix 9 annexed hereto. The evidence in the record relating to this matter is set forth in Appendix 10 annexed hereto. This evidence may be briefly summarized as follows:

The minutes of the Board of Directors of the corporation for a meeting on September 1, 1959, contained the following [Tr. 1017]:

> Fifth, the President also mentioned that the corporation had acquired certain interests in oil leases and that it was in the corporation's best interest to acquire several others. After discussion, it was resolved that the action of the officers in these and in the management of the corporate business be approved by the Board and that the officers be commended for the splendid progress the corporation is making.

Mr. Villee included in Exhibit 207 the moneys expended on oil exploration as follows:

"Unauthorized Ventures:	
Oil Exploration:	
Dry hole costs	$15,789.70
Intangible Drilling and Development Expense	62,431.48
Midge Oil Co. Loss	350.70
	$78,571.88

With respect to the caption "Unauthorized Ventures" Mr. Enright and the court made it clear that it was a mere conclusion of Mr. Villee and was used only in a descriptive sense. See the testimony and statements in Appendix 1 annexed hereto.

Mr. Villee testified he concluded the oil exploration was unauthorized because of the partnership agreement. He testified that the corporation paid Mr. Sheldon $2,-500.00 for an interest in an oil well. Mr. Hohly testified that the corporation acquired other oil leases and spent sums in drilling. Mr. Bailey testified that he kept the books on the oil investments of the corporation and also kept separate books for the personal investment of Mr. Sheldon's oil investments.

The auditor's report of the corporation as of February 29, 1956 [Ex. 214, Tr. 1135], shows the corporation had investments in oil wells of a value of $21.-000.00.

Based on the foregoing evidence the trial court made its Supplemental Finding of Fact 12 wherein it was found:

> "The Sheldons obtained various secret benefits * * *. Among such benefits were * * * the shifting of $78,571.88 oil losses incurred by B. H. Sheldon and recorded upon the trailer venture's record. * * *"

This finding is not sustained by the evidence.

In the first place there is absolutely no evidence that the funds of the corporation were being spent upon oil lands owned by B. H. Sheldon or Mae Sheldon. There is no evidence that such moneys were in any manner being expended for the benefit of B. H. Sheldon or Mae Sheldon. The evidence is to the contrary and clearly indicates that if the investments had been profitable the profits would have accrued to the corporation.

There is absolutely no evidence that B. H. Sheldon had incurred oil losses of $78,571.88 or any other sum and had shifted such loss to the corporation. Certainly there is nothing in the record to show that Mae Sheldon was unjustly enriched by the moneys expended by the corporation on oil investments.

It must be remembered that Mae Sheldon was neither an officer or director of the corporation at the time the investments in oil wells were being made. Therefore, even assuming that it was wrongful for the corporation to make the investments in the oil wells, Mae Sheldon cannot be personally charged with the re-

sponsibility therefor. She can be charged only with that which she receives and which unjustly enriches her. In *Ward v. Taggart,* 51 Cal. 2d 736, the defendant Taggart was held to be "an involuntary trustee for the benefit of plaintiffs on the secret profit of $1,000 per acre that he made from his dealings with them "while the judgment against the defendant Jordan was reversed because

> "Although she permitted her name to be used in the dual escrows, she did not share in the illicit profit that Taggart obtained. *One cannot be held to be a constructive trustee of something he has not acquired."*

The evidence relating to oil investments falls far short of sustaining the finding that the Sheldons were unjustly enriched in the sum of $78,571.88. In fact, the auditor's report [Ex. 214, Tr. 1135] clearly shows that 52% of the "oil losses" would otherwise have been paid to the Federal Government as corporate income tax, and 4% would have been paid to the State of California as corporate franchise tax. Therefore, while Mae Sheldon and Ben Sheldon were not enriched in any sense whatsoever, the actual detriment suffered by Walter Lutz by reason of speculation in oil would be only 1/9th of 44% of the said sum of $78,221.18.

3. The Judgment for $55,000 Is Not Sustained by the Findings of Fact Relating to the Capitalization of Profits.

By the last paragraph of Supplemental Findings of Fact No. 12 [Supplement Transcript of Record after Remand, p. 605, lines 15-32] the trial court attempts to justify the judgment of $55,000 by presenting again the argument for valuing the 9% interest of Walter Lutz by capitalizing the past and future earnings of the trailer business. He thus values the plaintiff's misappropriated interest at $126,760.27.

The foregoing is clearly contrary to the law of the case as determined by the opinion of the court of appeals. This matter was argued at length in the briefs filed on the first appeal (Appellee's Consolidated Brief, pp. 43, 44, 110-113, Reply Brief of Mae Sheldon, pp. 11-17) and was again strenuously argued in oral argument before the Court of Appeals.

In response to such argument the opinion of the Court of Appeals ruled as follows:

> "In opposition to the bank's contentions, Lutz argues that under California law he is entitled, subject to the court's judgment, either to the value of the converted property or to all damages proximately caused by the conversion. Further he contends that under California law it is proper, in assessing damages, to take into consideration past and projected profits of which he has been deprived. He asserts that were such matters taken into con-

sideration by the district court they may well have offset the sums due Sheldon.

"But the value of the business reflects the prospective profits of that business. The price paid to the bank by Thompson, under recognized business practice, must have been based in part upon a capitalization of such prospective profits. What Lutz is here saying in effect is that the district court may well have felt that Thompson's rate of capitalization was inadequate and that the purchase price therefore did not truly reflect the value of the property converted. The record does not bear this out. In accordance with Lutz' own proposal, damages were computed by the court upon the value as of May 8, 1956, of the property of Lutz converted by the bank as established by the sum for which it was sold by the bank."[4]

The foregoing excerpt plainly states the law of this case and effectively disposes of the argument for capitalization of past and future earnings.

4. Supplemental Finding of Fact No. 14 Is Not Sustained by the Evidence or Supported by the Pleadings.

In Supplemental Finding of Fact No. 14 [Supplemental Transcript of Record after Remand, p. 606, lines 2-6], the trial court found as follows:

---

[4]The estate of Sheldon was directed to give up what the court regarded as unjust enrichment. This itself is wholly inconsistent with the proposition that (although it was a nonfraudulent converter) it should be held liable for more than that which it had itself realized."

(297 F. 2d 162, 163.)

"14. Fair compensation to plaintiff for the time and money properly expended by plaintiff in pursuit of the property converted is the sum of $3,310.07, which was reasonably and necessarily incurred by plaintiff for accounting services and expenses."

Plaintiff is not entitled to recover any portion of the accounting fees of Mr. Villee for the reasons hereinafter set forth:

(a) *There Is No Pleading to Support a Recovery of the Accounting Fees, or Any Portion Thereof.*

The amended complaint [Tr. pp. 10-70] contains no allegation supporting this element of special damages.

The amended pre-trial conference order [Tr. pp. 153-158] makes no mention of the claim.

It is well-settled that such special damages must be properly pleaded and proved in order for a recovery to be made. In speaking of such special damages arising from a conversion, American Jurisprudence (53 Am. Jur. 896) states:

"The general rule is that special damages, which have been defined as such damages as arise from the special circumstances of the case, *which, if properly pleaded,* may be added to the general damages which the law presumes or implies from the mere invasion of the plaintiff's rights, may be recovered in an action for conversion, * * *"

Obviously, plaintiff cannot recover against Security First National Bank, as Executor of the Will of Ben-

jamin Harrison Sheldon, deceased, for such item of special damages unless it was included in the claim filed with the Executor. This was not done. [Tr. pp. 67-70.]

The plaintiff cannot recover against any other defendant for this item of special damages unless it was properly pleaded. This was not done. Defendants cannot be expected to be prepared to meet issues which are not included within the pleadings filed by the parties.

The consideration of this matter was wholly outside the mandate of the United States Court of Appeals as expressed in its opinion on the first appeal.

Apparently the plaintiff had some misgivings about the propriety of this item of special damages and about Supplemental Findings of Fact 12, because after the Revised Judgment was made, plaintiff filed his Notice of Application for Costs and Cost Bill, wherein he sought to have accounting fees in the sum of $3,310.07 taxed as costs. [Supplemental Transcript of Record after Remand, p. 610.] This application was denied by the clerk and plaintiff made a Motion to Re-Tax Costs, which was denied by the trial court. [Supplemental Transcript of Record after Remand, p. 628.]

(b) *The Accounting Fees of Mr. Villee Do Not Constitute a Proper Item of Special Damage.*

At the hearing on March 19, 1962, after remand, Mr. Villee testified to the value of his services and his invoice therefor was introduced in evidence as Exhibit 222.

Exhibit 222 represents the statement of the fees owing to Mr. Villee for accounting services rendered to Mr. Joseph Enright from August 11, 1957, to and including June 19, 1959, in the total sum of $4,157.57. Exhibit 222 shows that the services of Mr. Villee did not start until August 1957. The record clearly and plainly demonstrates that the services of Mr. Villee cannot qualify as "money properly expended in pursuit of the property" as stated in Section 3336 of the California Civil Code.

The creditor's claim filed by Walter A. Lutz against the Estate of Ben Sheldon, deceased, was verified by Mr. Lutz on October 15, 1956. [Tr. p. 70.] In this claim the plaintiff, Walter A. Lutz, alleged and claimed that the Executor held in trust for him 390.98 shares of the capital stock of B. H. Sheldon Company, together with debentures in the amount of $6,341.45. This claim demonstrates that at least on October 15, 1956, the plaintiff, Walter Lutz, had identified the exact number of shares and the amount of the debentures to which he was entitled and he knew the exact location of said additional shares and debentures, namely, in the possession of the Security First National Bank, as Executor of the Estate of Ben Sheldon, deceased. There was no need for any further expenditure of time and money in pursuit of the shares of stock and debentures, which constitute the subject matter of the conversion. The said shares and debentures were sold by the said Executor and Mae Sheldon to James G. Thompson on or about May 8, 1956. The sale of the said shares and debentures

was confirmed by the Probate Court on or about June 26, 1956 [Tr. p. 161] and obviously at the time of the filing of the creditor's claim the facts of the conversion of the shares of stock and debentures were well-known to the plaintiff, who subsequently prepared and filed his creditor's claim therefor.

On June 14, 1957, plaintiff Walter Lutz sold to Flamingo Trailer Manufacturing Corporation the shares of stock and debentures originally issued to him. It is clear that Mr. Lutz was then well-advised of the value of the shares and debentures allegedly converted, for he later adopted and stipulated that the price of the shares and debentures sold to Flamingo Trailer Manufacturing Corporation represented the value of the shares and debentures allegedly converted by the defendants. The creditor's claim was verified and filed approximately ten months prior to the employment of Mr. Villee and plaintiff's sale to Flamingo Trailer Manufacturing Corporation also occurred prior to the employment of Mr. Villee.

Thus, there is no factual basis to show that the accounting fees of Mr. Villee were expended by the plaintiff in pursuit of the property.

(c) *The Record Amply Demonstrates That the Accounting Fees of Mr. Villee Were Expended for the Purpose of Preparing Testimony to Be Given at the Trial, and for Purposes Entirely Unrelated to the Provisions of the Second Paragraph of Section 3336 of the California Civil Code.*

All of the services expended by Mr. Villee in the preparation of Exhibit 210 [Tr. p. 1110] and the ex-

amination of the records of Flamingo Trailer Manufacturing Corporation, from which such items were taken, are entirely concerned with the attempt to establish a basis for a judgment against the defendant Mae Sheldon, in addition to the judgment for conversion of shares of stock and debentures.

It is clear from the testimony of Mr. Villee at the last hearing in Court that Exhibit 222 represents charges for services in preparation of exhibits and in testifying as an expert witness at the trial of the above matter. The moneys for such fees clearly cannot be said to be "properly expended in pursuit of the property."

It is respectfully submitted that a perusal of the testimony given by Mr. Villee at the trial will clearly demonstrate that the fees paid to him were not "moneys properly expended in pursuit of the property," as referred to in Section 3336 of the California Civil Code.

The burden of proving this element of special damages is upon the plaintiff and the testimony of Mr. Villee did not furnish clear and definite proof of what portion of his services, if any, were properly required in order to pursue the property allegedly converted. The proof and evidence in the instant case is no better than that in *Sherman v. Finch,* 71 Cal. 68, where the Court said (pp. 71-72):

> "But the evidence the court permitted the plaintiffs to give for the purpose of entitling them to compensation for time and money expended in pur-

suit of the property was not proper, and defendant's motion to strike the same out should have been granted. It was altogether too indefinite and uncertain. To entitle a party to such compensation the testimony should tend to show that money was properly paid out and time properly lost in pursuit of the property, and how much. And when that is done, it is for the court or the jury, as the case may be, to allow a fair compensation therefor."

It is respectfully submitted that the pleadings and the evidence do not justify the recovery by the plaintiff of any portion of the accounting fees paid to Mr. Villee as a part of the damages for the alleged conversion. Such fees are clearly not taxable as costs.

> "The general federal rule is that the compensation paid to an expert witness in excess of the statutory attendance fee of $4.00 per day, mileage, and subsistence allowance when warranted is not taxable." (*Moore's Federal Practice,* 2d Edition Vol. 6, 1367."

Summary.

1. As to Judgment for Conversion.

Under the law of this case as established on the first appeal, Mae Sheldon submits that the trial court again erred in that its determination of the damages for conversion failed to give credit for

(1) the $57,200.00 loaned by Ben Sheldon to the partnership, and failed

(2) to give credit for the reasonable value of Ben Sheldon's services to the partnership.

Clearly, the rendition after remand, of a judgment for conversion in the same amount of the judgment reversed on appeal was erroneous. This judgment should once again be set aside. Perhaps the proper procedure would require the matter to again be remanded to the trial court with instructions. However, we join with the other appellants and urge the United States Court of Appeals to determine the proper amount of the damages for conversion and issue a remittitur accordingly. This procedure was substantially followed in *Alexander v. Nash-Kelvinator Corporation,* 261 F. 2d 187 (2nd Cir. 1958) and 271 F. 2d 524 (1959), where the trial court after remand fixed damages in the same sum as before.

We believe this same procedure would be welcomed by the trial court in the instant case. In making its Supplemental Findings the court said,

> "However, the Court intends to find all of the relevant facts, so that if its construction of the mandate is in error, a further remand will be unnecessary." [Supplemental Transcript of Record After Remand, p. 599, lines 14-17.]
>
> At the hearing on February 19, 1962, the trial court said:
>
> The Court: I am only sorry that the Court of Appeals, having tried part of the case, didn't go ahead and finish it." [Rep. Tr. Feb. 19, 1962, p. 4, lines 9-11.]

Certainly the expense involved in further litigation justifies the Court of Appeals in making a final determination.

2. As to the Additional Judgment Against Mae Sheldon.

Under the law of the case as established on the first appeal Mae Sheldon is liable to the plaintiff for his share of any additional benefits which Mae Sheldon received from the trailer business to which she can show no equitable right.

The evidence does not sustain the judgment of $55,-000.00. Against the sum of $55,000.00 will be credited "any principal sum actually received by plaintiff pursuant to" the judgment for conversion. As pointed out earlier in this brief the principal sum of the conversion judgment as adopted by the trial court was $25,217.07. This leaves a balance of $29,782.93 which must be supported by evidence of benefits received by Mae Sheldon to which she was not justly entitled. This means that in order to justify a judgment against Mae Sheldon and in favor of Walter Lutz in the sum of $29,782.93, the record must show that Mae Sheldon was unjustly enriched in the total sum of $330,921.40, as 9% of $330,921.40 equals $29,782.93, the amount of the additional judgment against Mae Sheldon which allegedly is Walter Lutz' share of such unjust enrichment.

The foregoing illustrates the absurdity of the judgment for $55,000.00 against Mae Sheldon, as even the sum total of all amounts mentioned by the trial court

in its findings as benefits and unjust enrichment of Mae Sheldon does not equal $330,921.40.

It is respectfully submitted that the trial court has again erred, and the judgment against Mae Sheldon should be set aside. As pointed out above, it is the desire of all appellants to bring this expensive litigation to an end.

We believe the foregoing argument shows that the only benefits actually received by Mae Sheldon or Ben Sheldon which might be the subject matter of an additional judgment against Mae Sheldon are (1) salaries in excess of the reasonable value thereof, and (2) improper reimbursement for expenses. The record shows that Mae Sheldon was president of the corporation for the two months' period and that she was at the plant every working day and unquestionably rendered some service to the corporation. The record further shows that Ben Sheldon, as executive officer of the trailer business, entertained dealers and distributors and incurred out-of-pocket expenses in the course of his duties. We do not think the sums paid to him are unreasonable and excessive in view of the activities performed by him on behalf of the corporation.

In the interest of procuring a final determination of this matter, we ask the United States Court of Appeals to determine on the evidence the amount of an additional judgment against Mae Sheldon. While we will not concede that any judgment against Mae Sheldon is

justified, for the sake of procuring final settlement of this matter, we will, without waiving the position taken in this brief, consent to the following:

(1) That the court of appeals determine whether or not any excessive salaries were paid to Ben Sheldon and if so the amount of any unjust enrichment of Mae Sheldon as a result thereof;

(2) That the court of appeals likewise similarly determine any unjust enrichment of Mae Sheldon by reason of the salary of $3,500.00 paid to her for her services as president for two months;

(3) That the court of appeals likewise determine the amount of any unjust enrichment of Mae Sheldon by reason of the expenses paid to Ben Sheldon of $14,-814.00.

We make the foregoing statements to assure this honorable court that the appellant Mae Sheldon will readily accept any final determination made by it in respect to the additional judgment to be rendered against Mae Sheldon.

Respectfully submitted,

GERALD BRIDGES,
Attorney for Appellant Mae Sheldon.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Gerald Bridges

APPENDIX 1.

(Testimony of Donald R. Villee). [Tr. 524]:

Mr. Henigson: To make the record clear—[139]

Mr. Enright: May I finish, if you please?

Mr. Henigson: Sure.

Mr. Enright: I do understand that there may be some difference as to use of some of the words in the exhibits where, for example, I believe the word is—what is that—unauthorized, Exhibit 207 uses the word "unauthorized oil"—I believe, yes—unauthorized ventures.

The Court: That will go down as the conclusion of the accountant.

Mr. Enright: Sure.

The Court: That is one of the questions, I assume, that is here for the court to determine.

Mr. Enright: It is the plaintiff's intention that that matter be settled by the court.

The Court: I see here, on one of these statements of known benefits—

Mr. Enright: I agree that that word, or words are inept, but it is not our intention to have this CPA draw any conclusions, but he has to use some words of identification.

The Court: Well, let's say he uses them in a descriptive sense.

Mr. Enright: That was the intention of the plaintiff, and it is plaintiff's position they are known benefits. But that is for the court to determine.

Now Mr. Henigson, proceed. [140]

APPENDIX 2.

Finding 34 [Tr. 213]:

B. H. Sheldon represented to plaintiff about February 1955, to induce him to consent to the conversion of the trailer manufacturing business from a partnership, * * * to a corporate venture: * * *

Plaintiff relied upon the said representations and did then consent to the formation of a corporation to carry on the trailer manufacturing business. Each of these representations was made with the intent: * * * (c) to conceal B. H. Sheldon would appropriate a profit in the amount of $11,161.36 realized upon the sale of house trailers to the General Services Administration of the United States when converting the trailer business from a partnership to a corporation. * * *

Finding 39 [Tr. 218, 220]:

Concerning defendants' pre-trial order statement of their contentions, the court finds:

* * * (3) It is true a particular separate profit of $11,161.36 was realized upon the General Services Administration Contract referred to in finding 39(1), which profit was credited by B. H. Sheldon and Robert Hohly to the capital account of B. H. Sheldon and Mae Sheldon. It is also true neither B. H. Sheldon nor Robert Hohly disclosed to plaintiff the entire $11,161.36 was credited to B. H. Sheldon and Mae Sheldon, who at most were entitled to receive as general partners 60 percent of this profit when profits were distributed under the partnership agreement. It is untrue no injury was

caused to plaintiff because of this transaction for the reason this $11,161.36 when credited to the general partners', B. H. Sheldon and Mae Sheldon, capital account was then used as one of the items to partially account for the issuance of 80 percent of the stock and debentures of Flamingo to B. H. Sheldon and Mae Sheldon. It is further true no accounting upon the issuance of these securities was made by B. H. Sheldon, Mae Sheldon or Robert Hohly or any of them to the plaintiff.

Supplemental Finding after Remand 12 [p. 8, lines 29-32, p. 9, lines 1 and 2, Supplemental Transcript of Record on Appeal after Remand]:

> "12. The Sheldons obtained various secret benefits from B. H. Sheldon's control of the partnership and later the Corporation, all of which were concealed from plaintiff, a limited parner. Among such benefits were $80,352.42 in profit-sharing salaries, $14,814 unaccounted for expenses, the $11,161.33 profit on the G.S.A. Contract, * * *"

APPENDIX 3.

(Testimony of Donald R. Villee). [Tr. 547]:

By Mr. Henigson:

Q. Would you turn to account No. 102 in the books of B. H. Sheldon Co., a partnership?

A. I have it.

Q. You have an item there, January 17, 1955, posted in what sum?

A. There is no entry here dated January 17, 1955, Mr. Henigson.

Q. May I see the book, please?

(The exhibit referred to was passed to counsel).

By Mr. Henigson:

Q. The record to which you were referring is account No. 102 marked "Notes Payable" and I should have been more specific in my identification of the page.

I show you now the same book, account No. 170.9 and ask you whether there is a January 17th entry there for 1954?

A. (Examining exhibit).

Q. Excuse me. 1955.

A. Yes, there is.

Q. In what sum?

A. In the amount of $11,161.36.

Q. And that account purports to be what? [167]

A. The capital of B. H. Sheldon, general partner.

Q. And the posting was made from what page?

A. From the cash received register, 1.

Q. And does the cash received register 1 so reflect that $11,161.36 in cash came into the partnership on January 17, 1955?

A. I have not that ledger here, but I believe that it does.

(Testimony of Donald R. Villee). [Tr. 549-552]:

Q. Would you like to see it?

Mr. Enright: He can check his notes.

Mr. Henigson: I would prefer to hand him the book.

(The exhibit referred to was passed to the witness).

By Mr. Henigson:

Q. This is page No. CR-1, January 1955.

A. (Examining exhibit). Yes, there is an entry here in that amount.

Q. It doesn't seem to appear in Plaintiff's 204 for identification? A. No, it does not.

Q. Is there any reason from your inspection of the books and records only why it does not so appear?

A. That is an amount that was obtained from Western Mobilehomes Distributors Corporation.

Q. And the books of Western Mobilehomes Distributors [168] Corporation reflect that fact?

A. Yes, a payment to B. H. Sheldon in that amount.

Q. To B. H. Sheldon in that amount?

A. Yes, sir.

Q. And the cash was deposited to B. H. Sheldon Co., a partnership, according to the record you just read?

A. That is correct.

Q. On January 17, 1955 and then posted to the capital account of B. H. Sheldon, but it doesn't seem to be reflected on Plaintiff's 204. Why not?

A. I have examined—

Q. Based on your inspection of the books and records only.

A. One of the records which inspected, Mr. Henigson, was the partnership agreement.

Q. The reason that you did not post in your Plaintiff's 204, or include in Plaintiff's 204 for identification the sum of $11,161.36 is what?

A. I examined the partnership agreement which stated that the general capital, or rather the capital of the general partners, was to consist of all the assets and liabilities of Western Mobilehomes Distributors Corporation. This $11,000 represents the net profits on sales of Government contracts from June 1, 1954 forward which, in my opinion, represented profits belonging to the partnership and not therefore a contribution of B. H. Sheldon.

* * * * *

(Testimony of Donald R. Ville). [Tr. 575]:

Q. Now going on to your sheet No. 5 which has been marked Plaintiff's Exhibit 207 for identification—

A. Yes.

Q. —I see you start out with the sum of $11,161.33 as a withdrawal of funds, not profit on Government sales to Western Mobilehomes Distributors Corporation.

The Court: This sheet has no relationship to the others, does it?

The Witness: Not directly, your Honor, no. Each schedule stands for a specific purpose on its own.

The Court: The exhibit I am referring to is Exhibit 207 for identification.

Mr. Henigson: Yes, your Honor.

Q. Withdrawal of funds from what entity?

A. From Western Mobilehomes Distributors Corporation.

Q. And where did that cash withdrawal appear in the books and records of the corporation?

A. As a journal entry, Mr. Henigson.

The Court: It is already explained under the source of information. Haven't you checked that?

Mr. Henigson: That is where it was withdrawn from, your Honor, January 17, 1955 journal entry. I want to know [202] whether that same sum appeared on the same day in another book or record that Mr. Villee inspected.

The Court: Was it evidenced by check? It says check 1060. Is that what you mean?

Mr. Henigson: Yes, your Honor.

The Court: There is a check for $11,161.33, I take it, drawn on the Western Mobilehomes Distributors Corporation.

Mr. Henigson: Drawn by Western Mobilehomes Distributors Corporation.

The Court: Payable to Sheldon?

Mr. Henigson: Well, that is a question?

The Court: Was it? Do you have the check?

Mr. Henigson: I don't, your Honor.

The Court: Do you know anything about the check?

The Witness: I never saw the check, your Honor.

The Court: What do the books show?

The Witness: The books showed that check No. 1060 dated January 7th was payable to B. H. Sheldon.

The Court: Very well. Did it appear to have been deposited anywhere, is that your question, deposited back in either the corporation or the partnership?

The Witness: Yes, it was deposited in B. H. Sheldon Co. partnership books.

The Court: Was it deposited in B. H. Sheldon's [203] partnership bank account?

The Witness: I am sorry, your Honor. Your terminology is correct.

The Court: Was it?

The Witness: It was recorded as a cash receipt. We referred to it earlier.

The Court: As part of his capital contribution, is that correct?

The Witness: Yes, your Honor.

By Mr. Henigson:

Q. It does not appear in any of the personal commercial bank accounts that you inspected, or statements, for Mr. B. H. Sheldon, does it?

The Court: As I understand it, the opinion of the witness is that these were profits belonging to the partnership. That is his theory. The corporation owned them to the partnership. Instead of drawing a check to the partnership the corporation drew a check to Sheldon individually, Sheldon deposited it in the bank account of the partnership but claimed credit for it as a capital contribution as a general partners in the partnership. Is that correct?

The Witness: That is exactly correct.

(Testimony of Donald R. Villee.)

The Court: You may proceed.

See also Exhibits 183, 184 [Tr. 1032, 1033.]

APPENDIX 4.

(Testimony of Donald R. Villee) [Tr. 793, 794]:

Mr. Henigson: I think we can stipulate on that. I will [519] offer the stipulation that between the period July 12, 1954, to and including January 25, 1955, cash contributions were made by the decedent in the total sum of $67,200, of which $10,000 was repaid to him on about August 9, 1954.

Mr. Enright: That will be accepted. So the net amount then is $58,200?

Mr. Henigson: $57,200 in cash contributions during that period, now.

The Court: Very well.

Mr. Enright: In addition to the cash contributions, there is shown $11,161.36, being the General Services Administration 5 per cent.

Mr. Henigson: I will stipulate to that.

Mr. Enright: All right.

APPENDIX 5.

Finding 35 [Tr. 215]:

B. H. Sheldon did conceal from plaintiff when consummating the corporate conversion * * * (e) that B. H. Sheldon had during the period about January 1955, to March 1956, obtained $80,352.42 as salary for services and had obtained the sum of $14,814.00 as expenses.

Finding 39 [Tr. 218]:

Concerning defendants' pre-trial order statement of their contentions, the court finds:

* * * (4) It is true B. H. Sheldon received salaries in the sum of $80,352.42 and expenses in the sum of $14,814.00. It is also true B. H. Sheldon was by the provisions of paragraph 23 of the partnership agreement [Exhibit A of these findings] to be paid such reasonable compensation for services rendered in operating the business as were agreed upon by the general partners and a majority in interest of the limited partners. It is also true no such agreement upon the salary of B. H. Sheldon was ever made. On the contrary, these salaries and expenses were taken by B. H. Sheldon without the knowledge or consent of the plaintiff, the only knowledge plaintiff had of a desire of B. H. Sheldon to be paid a salary is as found in paragraph 34 hereof.

Supplemental Finding after Remand 1(b) [P. 4, lines 19-23, Supplemental Transcript of Record on Appeal after Remand]:

> "(b) Defendants have never attempted to substantiate or prove the propriety of $14,814 drawn by B. H. Sheldon as 'expense allowance'. Such unsubstantiated withdrawals by Sheldon cannot be presumed to be 'properly incurred'."

Supplemental Finding after Remand 12 [P. 8, lines 29-32, p. 9, line 1, Supplemental Transcript of Record on Appeal after Remand]:

> "12. The Sheldons obtained various secret benefits from B. H. Sheldon's control of the partnership and later the Corporation, all of which were concealed from plaintiff, a limited partner. Among such benefits were $80,352.42 in profit-sharing salaries, $14,814 unaccounted for expenses, * * *"

APPENDIX 6.

(Testimony of Donald R. Villee). [Tr. 578]:

The Court: You may proceed.

By Mr. Henigson:

Q. Directing your attention to Plaintiff's Exhibit 207, Mr. Villee, you have now there a total of expense allowances of $14,814 covering the period September 9, 1954 through what, ending what? A. It would end February, 28, 1956.

Q. Do the books and records of the corporation reflect that those expense allowances were utilized by Mr. Sheldon or Mrs. Sheldon for nonbusiness purposes? A. No, they do not reflect that they were not used for business purposes.

Q. For what reason do you include that sum in the statement of known benefits which you have entitled in your Plaintiff's Exhibit 207 for identification? A. I did not see any documents that would substantiate that there were any business expenses in that period sustained by Mr. Sheldon or Mrs. Sheldon.

Q. You didn't see any receipts or anything of that nature? A. No, sir.

Q. So you concluded that they were improperly used? A. And also by reason of the fact that they were in round thousand amounts per month. [205]

Q. For a portion of that total period? A. Yes.

The Court: Did you find in any of the minutes of the corporation, or prior to that, the partnership, anything allowing for or authorizing that purchase?

The Witness: No, sir, I did not.

The Court: Did you look for any?

The Witness: I examined the minutes and I did not see anything therein about expenses.

APPENDIX 7.

Finding 34 [Tr. 213]:

B. H. Sheldon represented to plaintiff about February 1955, to induce him to consent to the conversion of the trailer manufacturing business from a partnership, the terms and conditions thereof being set out in Exhibit A to these findings, to a corporate venture: * * * (i) that he, B. H. Sheldon, believed he should receive a salary in the amount of $1,000 per month for the past services he had rendered to the partnership.

Plaintiff relied upon the said representations and did then consent to the formation of a corporation to carry on the trailer manufacturing business. Each of these representations was false when made, * * * . Each of these representations was made with the intent: * * * (d) to evade the provisions of the Partnership Agreement, * * * (5) the provisions requiring the amount of salary to be paid to the general partners for services rendered to be agreed to by a majority in interest of the limited partners; and * * *

Finding 34 [Tr. 215]:

B. H. Sheldon did conceal from plaintiff when consummating the corporate conversion * * * (e) that B. H. Sheldon had, during the period about January 1955, to March 1956, obtained $80,352.42 as salary for services and had obtained the sum of $14,814.00 as expenses.

Finding 39 [Tr. 218]:

Concerning defendants pre-trial order statement of their contentions the court finds: * * * (4) It is true B. H. Sheldon received salaries in the sum of $80,-352.42 and expenses in the sum of $14,814.00. It is

also true B. H. Sheldon was by the provisions of paragraph 23 of the partnership agreement [Exhibit A of these findings] to be paid such reasonable compensation for operating the business as were agreed upon by the general partners and a majority in interest of the limited partners. It is also true no such agreement upon the salary of B. H. Sheldon was ever made. On the contrary, these salaries and expenses were taken by B. H. Sheldon without the knowledge or consent of the plaintiff, the only knowledge plaintiff had of a desire to B. H. Sheldon to be paid a salary is as found in paragraph 34 hereof. That some time after January 31, 1955, B. H. Sheldon and Robert Hohly, along with R. L. Merrifield, caused to be recorded in the records of Flamingo a director's resolution authorizing the payment of a salary to B. H. Sheldon of 15 per cent of the profits of the trailer business, but in no event less than $5,000.00 per month. This Court makes no finding as to what salary would be reasonable for the services of B. H. Sheldon because of the other facts found, its conclusions and judgment.

Supplemental Findings after Remand 5, 6, 7, 8 and 9 [pp. 6, 7 and 8 Supplemental Transcript of Record on Appeal after Remand]:

> "5. In April, 1955, B. H. Sheldon caused his controlled corporation, Flamingo, to issue him a 'salary' check for $4,776.07 (10% of profits), in full payment of amounts Sheldon had secretly accrued for himself on the partnership's books as 'accrued payroll' during the period March 18, 1954 to February 18, 1955 (which included the so-called 'partnership period', July 1, 1954 to January 31, 1955) and concealed these acts from his

limited partners. The transfer to the Corporation was motivated, in part, by Sheldon's desire to hide such fraudulent conduct from his partners.

6. Sheldon devoted considerably less than his entire time to the trailer business in the period July 1, 1954 to March 3, 1956. Other persons contributed more importantly to the success of the trailer venture, while Sheldon attended to his gambling club and oil ventures, and, with Hohly's assistance, consummated the misappropriation of the partnership in 1955. Limited partner Eisenhower obtained $100,000 needed working capital on his own credit from a Tacoma bank, obtained vital raw materials, was instrumental in securing the lucrative G. S. A. contract, and participated in production and sales policy decisions. L. B. McKinney, the factory superintendent who was in charge of production, was paid a salary of 10% of profits, which at one time exceeded $5,000 per month. Trailers not sold to the Government were sold on commission, Hohly did the necessary cost accounting, and a salaried office staff handled administration, while J. L. Merrifield, an experienced trailer executive, devoted 100% of his time to the business. Viewing the entire record, even apart from any question regarding the burden of proof, I find that B. H. Sheldon's services to the partnership and later the corporation were insubstantial.

7. Based upon all the circumstances, a maximum reasonable salary for B. H. Sheldon's services to the partnership in the seven months, July 1, 1954 to January 31, 1955, would not have exceeded $600.00 per month, or a total of $4,200,

even assuming that: (1) in equity Sheldon was entitled to some salary notwithstanding that no agreement had been requested or made pursuant to Paragraph 23 of the partnership agreement; (2) that he did not waive any such claim to salary; and, (3) that he had not already been paid for such services.

The $4,776.07 salary Sheldon secretly paid himself in April, 1955, for his services to the partnership was excessive for the services he actually rendered, and he was unjustly enriched thereby in the sum of $576.07, assuming he had an equitable right to any salary at all.

8. Following the transfer of the partnership assets upon the books and records of the trailer venture to the Corporation on February 1, 1955, B. H. Sheldon continued to secretly accrue a salary for himself on the Corporation's books under the legend 'accrued payroll', and from time to time paid himself 'salary' which was debited to such account. Months later, Sheldon's Board of Directors purported to approve such 'salary' retroactively.

9. Based upon all the circumstances, a maximum reasonable salary for B. H. Sheldon's services in the corporation period, February 1, 1955 to March 3, 1956, would have been $600 per month or $7,800. The retroactive profit sharing salary Sheldon secretly paid himself was exorbitant, and Sheldon was unjustly enriched thereby in the sum of $64,276.35—the excess of the $72,-076.35 he paid himself over the $7,800 found reasonable, assuming he had an equitable right to any salary at all."

APPENDIX 8.

(Testimony of Walter A. Lutz). [Tr. 392]:

By Mr. Bridges:

Q. Had you learned prior to June 1956. Doctor that Mr. Sheldon was drawing a salary or had received any salary from either the partnership or corporation?

A. I had heard that he was receiving $5,000 in February of 1956.

The Court: $5,000 a month?

The Witness: $5,000 a month.

The Court: Was that the first you had ever heard that he was receiving any salary?

The Witness: Yes, sir.

By Mr. Bridges:

Q. From whom did you receive this information?

A. I first received it from Mrs. Lutz. On that week we were down in '56, it was either a Tuesday—it had to be a Tuesday—Mrs. Sheldon called Mrs. Lutz into the living room and said, "Sit down a minute, Sunny," and she said to Sunny, "Don't you think Daddy is entitled to a salary, everybody [128-57] else is getting something," and Sunny says, "Yes, I do."

She said, "Well, he is taking $5,000 a month," and I guess Sunny was flabbergasted, she didn't say a word, and she told me about it that same night or so.

Q. What did you do, or did you speak to Mr. Sheldon about that at any time thereafter?

A. I didn't have an opportunity to talk to him about it.

Q. Do you recall which day of the week that conversation was?

A. With Mrs. Sheldon and Mrs. Lutz?

Q. Yes.

A. I can't recall exactly. It had to be Tuesday or Wednesday.

[Plaintiff's Exhibit 169, Tr. 1014, 1017, 1018]:

Excerpt from minutes of Board of Directors of B. H. Sheldon Company held on September 1, 1955.

"Sixth, Mr. Sheldon noted that the salary of Mr. L. B. McKinney, factory superintendent, was currently based on 10% of the corporation's profits before taxes and he noted that in recent months this salary had been in excess of $5,000.00 per month. Thereupon, he turned to Mr. McKinney, who had just entered the meeting, and proposed that a flat salary arrangement be worked out with him effective as of July 1, 1955. Mr. Sheldon stated that he felt a monthly salary of $5,000.00 was a reasonable amount. Thereupon, Mr. McKinney agreed and it was mutually agreed between the Directors and Mr. McKinney that his salary be set at $5,000.00 per month effective July 1, 1955. This is to supersede the previous agreement.

Thereupon, Mr. Merrifield mentioned that he felt Mr. Sheldon's salary should be adjusted. After discussion, it was resolved that Mr. Sheldon's salary for the current fiscal year be set at 15% of the corporation's profits before taxes, as reported on its Federal tax return but before deducting Mr. Sheldon's salary, but that in no event it should be less than $5,000.00 per month." [Tr. 722, 723]:

Mr. Bridges: May it be further stipulated that at a special meeting of the board of directors of said corporation, held May 9, 1956, with all of the five directors present, [425] that Mae Sheldon at that time resigned as a director and president of said corporation.

Mr. Enright: I will stipulate the minutes so recite. Whether they were present or not I do not know. That was May 9th. And on which date James G. Thompson was elected a director.

The Court: Is that so stipulated?

Mr. Bridges: Mr. Thompson was elected president and a director.

So stipulated.

May it be further stipulated that at the special meeting of the board of directors of the said corporation on March 5, 1956 a resolution was passed reading as follows:

> "That Mrs. Mae Sheldon be and she hereby is appointed as president of this corporation, her compensation in said position being and hereby is fixed at the sum of $3,500 per month commencing immediately."

Mr. Enright: So stipulated. The persons present at that meeting were Robert Hohly and J. L. Merrifield.

The Court: So Stipulated?

Mr. Bridges: So stipulated.

(Testimony of Carroll Robert Hohly) [Tr. 821-826]:

Q. I believe you testified that you have been an accountant since sometime in 1948, is that correct?

A. That is correct.

Q. A certified public account since sometime in 1948? A. Yes.

Q. For what period of time approximately have you been servicing in your professional capacity trailer manufacturing businesses?

A. A period of in excess of ten years.

Q. And approximately how many different trailer manufacturing businesses did you work for at that time in a professional capacity?

A. We have eight manufacturing clients.

Q. Is it true that during the last eight years you have performed professional accounting services for approximately that number of trailer manufacturing enterprises?

A. During the period we have performed services for 13.

Q. In connection with the performance of those accounting services, did you have occasion to learn the gross [556] sales, the net profits and the executive salaries paid by other trailer ventures in this area?

A. Yes.

Q. What kind of a criterion or standard is normally employed to determine the relative size or significance of a trailer business?

A. The units manufactured.

Q. Units manufactured in a unit time?

A. Yes.

Q. So many trailers per day? A. Yes.

Q. Or per month? A. Yes.

Q. Now employing that criterion, what was the relative size of Western Mobilehomes Distributors Corporation in the Southern California area in March of 1954 when Ben Sheldon first became financially interested in the enterprise? A. Very small.

Q. What was the relative size of the same corporation, based on the same criterion in the same market area, about the time that Ben Sheldon died?

A. It was the largest in the West Coast.

Q. Now from your own knowledge, can you tell us what services Ben Sheldon performed for the trailer business during the period from March 1954 to March 1956? [557]

A. Mr. Sheldon was the executive manager of the business, taking the full responsibility for direction of the enterprise, including its sales and purchasing policy.

Q. Do you have an opinion based upon your personal knowledge of the services that Ben Sheldon performed on behalf of the corporation B. H. Sheldon Co., based upon the responsibility assumed by Mr. Sheldon and upon the results achieved by him, and upon your knowledge of the practice in the trailer manufacturing trade in the Southern California area in compensating managerial personnel as to the reasonableness of the compensation paid Mr. Sheldon from February 1, 1955 until his death? A. I believe—

Q. Just answer yes or no. Do you have an opinion? A. Yes.

Q. What is that opinion?

Mr. Enright: To which objection is made as incompetent, irrelevant and immaterial. First, the partnership contract provided that the salary of the general partners was to be settled by the general partners and a majority of the interest of the limited partners; second, that salary of this corporation is of no materiality or relevancy at this time.

The Court: Salary as what?

Mr. Enright: Of Ben Sheldon as president—I [558] assume that is what he is referring to—as president of this corporation, that it is incompentent, irrelevant and immaterial.

Mr. Henigson: On plaintiff's theory of the case that might be true, but it is the Bank's theory that the enterprise was being operated as a corporation and not as a partnership during the period specified in my question, which was February 1, 1955 until the date of Ben Sheldon's death.

Mr. Enright: I missed the date February, 1, 1955. I withdraw my objection.

The Court: In its entirety?

Mr. Enright: I think that is advisable.

The Court: You may answer.

By Mr. Henigson:

Q. Will you please state your opinion as to the reasonableness of Mr. Sheldon's salary during the period specified?

Mr. Enright: Oh, no. The question is, what is a reasonable salary, not this question. Then I object to it. What is a reasonable salary in the opinion of this witness, I thought was the question.

Mr. Henigson: That is all I am asking for, the opinion of this witness.

The Court: In the form you put it, it is objectionable. The end result may be the same when the witness [559] answers, but let him answer his opinion as to what would be a reasonable salary for a person doing whatever this person was doing in that particular industry during that time.

By Mr. Henigson:

Q. What is your opinion based upon the factors earlier expressed to you as to what a reasonable salary would be for a man performing the services that you testified Ben Sheldon performed during the period indicated?

A. I believe that a reasonable salary to properly compensate an officer performing these duties would be based upon a minimum plus a percentage of the profits and that the results obtained, using the profit formula, would produce a reasonable salary.

Q. You are familiar with the results obtained during this period, are you not? A. I am.

Q. Will you give us a dollar amount based on those results, upon the responsibility assumed and the services performed?

A. I believe that a salary from $70,000 to $90,000 would be reasonable.

Q. Do you have an opinion as to a fair and reasonable salary figure for the services performed by Ben Sheldon on behalf of the partnership B. H. Sheldon Co. from July 1, 1954 to January 31, 1955, based upon your knowledge of what [560] Mr. Sheldon did, of the responsibility he had, and the results he achieved, and based upon your knowledge of the practice in the trailer manufacturing industry in the Southern California area in compensating executive or managerial personnel. Do you have an opinion? A. Yes.

Mr. Enright: As to how much he is paid?

Mr. Henigson: I haven't asked the question.

Mr. Enright: He asked whether he had an opinion. I submit his opinion is incompetent, irrelevant and immaterial, that was there was a written contract here specifically providing that salary was to be fixed by agreement of the parties.

The Court: That is plaintiff's theory of the case. The defendants' theory is different, I take it.

Mr. Enright: Plaintiff's theory of the case is that it is a matter of law by contract. There can be no salary until such time as they approve an agreement for a salary of some amount.

The Court: It is relevant under defendant's theory. Overruled.

I am not ruling of the sufficiency of the document on which you rely to preclude the issue.

The Witness: I believe that a salary from $3,000 to $35,000 would be reasonable. [561]

By Mr. Henigson:

Q. For that seven-month period, July 1, 1954 to January 31, 1955? A. Yes.

Mr. Henigson: No further questions, your Honor.

APPENDIX 9.

Finding 36 [Tr. 216]

* * * Robert Hohly did not exercise the degree of care an ordinary certified public accountant would have exercised in the area where his services were rendered during the period about July 9, 1954, to about February 1957, when rendering such services including the rendition of services pertaining to * * *(f) failing to inform plaintiff and the other limited partners he, along with B. H. Sheldon and J. L. Merrifield had, during the period about June 22, 1955, to March 13, 1956, acted as the directors of the corporation and has as such directors voted * * * (3) authorizing the corporation to engage in oil ventures, including the acquisition of leases from B. H. Sheldon resulting in losses of $78,-571.88 during the period about May, 1955, to March 1956. Robert Hohly did, as a certified public accountant, cause the books and records of the trailer venture, then being operated in the corporate name B. H. Sheldon Co., to record the transactions authorized by these resolutions.

Finding 39 [Tr. 218]:

Concerning defendants' pre-trial order statement of their contentions, the court finds:

* * * * *

(6) It is untrue plaintiff had knowledge of or consented to the trailer manufacturing venture or Flamingo expending money for drilling for oil; on the contrary, plaintiff was solicited by B. H. Sheldon and Mae Sheldon to invest with the Sheldons and others in certain oil ventures which were and would be separate from the trailer venture. That in reliance upon these solicitations, plaintiff did pay $20,000.00 to B. H. Shel-

don in the year 1955 to be invested to acquire certain oil leases and to drill wells upon the leases. Thereafter, plaintiff was advised by B. H. Sheldon and Mae Sheldon some of the wells drilled resulted in dry holes. Thereafter, and after the death of B. H. Sheldon and after the plaintiff had incurred the expense of his attorneys and accountant, he acquired knowledge that Flamingo bore losses in the sum of $78,571.88 [Ex. 207] arising out of these oil drilling investments, all as set forth in Finding 36(f)(3).

Supplemental Finding after Remand 1(d) [p. 5, lines 2-10 Supplemental Transcript of Record on Appeal after Remand]:

> "(d) Even after giving the Sheldons credit for $600 per month salary for the period February 1, 1955 to March 3, 1956, the Sheldons obtained in excess of $170,000 in benefits from the partnership and corporation to which they had no equitable right. Plaintiff was damaged thereby to the extent of his 9% interest, or $15,300, in addition to any other damages caused by the Sheldons' fraud herein found."

Supplemental Finding after Remand 12 [pp. 8, 9 and 10 Supplemental Transcript of Record on Appeal after Remand]:

> "12. The Sheldons obtained various secret benefits from B. H. Sheldon's control of the partnership and later the Corporation, all of which were concealed from plaintiff, a limited partner. Among such benefits were $80,352.42 in profit-sharing salaries, $14,814 unaccounted for expenses, the $11,161.33 profit on the G. S. A. Contract, the shifting of $78,571.88 oil losses incurred by B. H. Sheldon and recorded upon the

trailer venture's records, the deficiency between the Sheldons' capital-contribution obligation and their actual investment. After adjustments for known benefits have been made to reflect the Sheldons' 60% interest, and after credit has been given for a reasonable salary to B. H. Sheldon, the Sheldons' minimum unauthorized benefits and advantages, as to which the Sheldons were unjustly enriched, were the sum of not less than $170,000; to plaintiff's damage to the extent of 9%, or $15,300 on the 'benefits obtained' theory, in addition to plaintiff's damages for conversion of the securities.

Defendant Mae Sheldon's constructive fraud, and defendant Robert Hohly's constructive fraud and negligence, heretofore found, was a direct and proximate cause of the detriment suffered by plaintiff as a result of the Sheldons' misappropriation of his 9% partnership interest and the substitution therefor of a 4.29% minority stockholder's interest. Plaintiff's detriment is the difference between the value of his partnership interest at the time of such misappropriation, and the sale price received by plaintiff for the securities issued to him, to wit, $23,083.35. One practical way to appraise the value of plaintiff's 9% partnership interest is to capitalize the earnings of the trailer venture over some reasonable period. (*Elsbach v. Mulligan,* 54 Cal. App. 2d 354, 136 P. 2d 651.) Plaintiff's 9% of the venture's actual profits of $1,251,953.26 (R. 224) for 32 months, heretofore found, is $112,675.79. Capitalizing such profits for 3 years, the value of plaintiff's misappropriated interest was $126,760.27."

APPENDIX 10.

(Testimony of Donald R. Villee) [Tr. 579]:

By Mr. Henigson:

In connection with those minutes and directing your attention to what you have entitled here, unauthorized ventures, oil exploration, intangible drilling and investment expense, loss total $78,571.88, still on Plaintiff's 207 for identification, what led you to conclude that those ventures were unauthorized?

A. The partnership agreement, Mr. Henigson.

Q. Did you inspect the minutes of the corporation, the minute book of the corporation of B. H. Sheldon Co.? A. Yes, I did.

Q. Did you find any authority for those expenditures in that minute book?

A. I believe there were minutes dated September 1st of 1955 which related to the oil ventures, yes.

Q. So that you concluded that these expenditures [206] totaling $78,000-odd were unauthorized by the corporation on account of a partnership agreement, is that correct?

Mr. Enright: Objected to on the grounds it calls for a conclusion of the witness.

Mr. Henigson: I am asking for the conclusion of the witness.

The Court: Overruled. He may answer.

Is that your reason?

The Witness: That is correct, your Honor.

The Court: What do you mean by intangible drilling and well expense?

The Witness: That was the terminology in the records, your Honor.

The Court: What do you interpret that to mean, space development?

The Witness: No, that would be drilling costs of an oil well principally.

The Court: Was there an identified oil well that it was spent on?

The Witness: There were many oil wells throughout the record that I examined.

By Mr. Henigson:

Q. You are talking about the corporate records?

A. Some in the corporate records, some in Mr. Sheldon's records. [207]

Q. I think the Judge's question referred to corporate records, if I am not mistaken.

The Court: I am referring to the corporate records, I don't suppose the witness thinks Mr. Sheldon's records have anything to do with this, does he?

The Witness: Mr. Sheldon received $2,500 for an interest in a well from the B. H. Sheldon Co. Corporation.

The Court: But do the books of the corporation call this intangible drilling and development expense account?

The Witness: I believe that is the title of the account, your Honor.

The Court: What does intangible drilling mean in that connection?

The Witness: Intangible as opposed to machinery or other tangible costs in connection with a well. Intangible would be the cost of going down into the ground to locate the oil.

The Court: It was drilling expenses?

The Witness: Yes.

The Court: What it means then, intangible drilling and development expense means drilling and improvement of an oil well, is that it?

The Witness: Yes, your Honor.

The Court: One or more of them.

The Witness: Yes. [208]

Excerpt from Exhibit 169 [Tr. 1014, 1017]:

* * * * *

Minutes of Board of Directors
of
B. H. Sheldon Co.

Held on September 1, 1955

Present were Mr. Merrifield, Mr. Sheldon and Mr. Hohly, constituting all of the directors of the corporation.

Mr. Sheldon called the meeting to order and noted that the Board of Directors had no Secretary. Thereupon, Mr. Merrifield recommended that Mr. Hohly take notes of the transactions at the meeting and prepare the minutes. Thereupon, it was resolved that Mr. Hohly be appointed Secretary of the Board of Directors.

Mr. Sheldon called the Board's attention to some recent events:

* * * * *

Fifth, the President also mentioned that the corporation had acquired certain interests in oil leases and that it was in the corporation's best interest to acquire several others. After discussion, it was resolved that the action of the officers in these and in the management of the corporate business be approved by the

Board and that the officers be commended for the splendid progress the corporation is making.

See also pages 382 and 383 of Transcript where this resolution is read into the record.

* * * * *

(Testimony of Carroll Robert Hohly.) [Tr. 653]:

Q. (By Mr. Backer): Then, as I understand your testimony, you merely recorded the transactions as they appeared on the books of the organization?

A. That is correct.

Q. Now, concerning this transfer of the oil interests, what were you asked to do about that, Mr. Hohly, and who asked you to do it? [302]

A. The officers of the corporation had started in oil ventures. It was discussed at the Board of Directors meeting, and the question was brought up, "Is this in the corporate benefit?" And after discussion it was determined it was in the corporate benefit to go into the oil ventures, or, let us say, to continue.

Q. At the time that transfer was made by you on the books of the corporation, did you know the condition of the several oil wells?

A. At the transfer—I don't understand you. There was no transfer that I know of. This is the—

The Court: You testified, as I understand it, that there wasn't any transfer, that the corporation just picked up where someone left off, and started financing the development of these wells; is that correct?

The Witness: That is right.

Q. (By Mr. Backer): They took over the wells?

A. No, they started drilling wells.

The Court: Were any leases transferred to the corporation?

The Witness: They were acquired, purchased.

The Court: Well, they were transferred to the corporation by someone?

The Witness: Well, they were sold by someone, yes; sold and exchanged for a check. [303]

The Court: And it was on these properties covered by these leases that these monies you are testifying about were expended?

The Witness: Yes, sir.

Q. (By Mr. Backer): At that time, when they were recorded on the books—

A. The minute book, you mean?

Q. Yes.—did you know whether or not those wells would be productive? A. No, sir.

Q. Then, in other words, so far as you knew it, was a speculative venture? A. Yes, sir.

Q. Who instructed you to record those on the minutes?

A. Pardon?

Q. Who instructed you with regard to the oil transfers and the acquisition of them?

A. There were no instructions, counselor. The oil ventures were the result of the expenditure of cash, the writing of checks, and the record of the cash disbursements in the corporate records.

(Testimony of Earl L. Bailey.) [Tr. 767]:

A. Oh, it was probably the second week of February, as well as I can recall, 1956.

Q. And the second meeting?

A. That was in the offices of Hill, Farrer & Burrill at a Directors' meeting.

Q. About what date?

A. I don't recall the date of that meeting.

Q. Was that after or before the death of Ben Sheldon?

A. That was after Mr. Sheldon's death.

Q. So you had only the one meeting prior to Mr. Sheldon's decease,—

A. Yes.

Q. —with Walter A. Lutz and his wife?

A. Yes. [485]

Q. And where did that meeting occur?

A. In the office of the manufacturing plant there in Gardena.

Q. Now, in whose presence and under what circumstances did that meeting occur?

A. Well, Mr. Sheldon brought Dr. Lutz into my office, and introduced him to me, and then Dr. Lutz introduced Mrs. Lutz to me.

Q. So that the three of you—I am sorry—the four of you were present in that office, and there were no other persons present; is that correct? A. Yes.

Q. And what, if anything, did Ben Sheldon say to you at that time?

A. He told me who Dr. and Mrs. Lutz were, that they were shareholders in the corporation, and told me to give them any information they needed, or wished.

Q. And after that what did Mr. Sheldon do?

A. He left the office. He left my office.

Q. Leaving Dr. and Mrs. Lutz with you—

A. Yes.

Q. —in your office? A. Yes.

Q. And what happened next?

A. As I recall, Dr. Lutz told me that Mrs. Lutz [486] handled the detailed affairs of their business, and referred me to her as far as answering questions was concerned. Then Dr. Lutz left the office.

Q. Dr. Lutz left the office?

A. Yes, and Mrs. Lutz and I continued to discuss her questions.

Q. And for approximately what period of time was Mrs. Lutz with you alone in your office?

A. I would say about twenty minutes.

Q. And during that period of time Mrs. Lutz made inquiries of you? A. Yes.

Q. And you answered those inquiries, to the best of your ability?

A. To the best of my ability, yes, sir.

Q. What was the subject or subjects of her inquiries made to you during that twenty-minute period that she was with you in the office?

A. It was regarding their oil investments in—or, Mr. Sheldon and also the corporation—that is, the oil investments that the corporation had.

Q. Did you give Mrs. Lutz all the information you had about which she inquired?

A. Yes, all that I had available.

Q. Now, please relate, if you can, how that meeting [487] came to a close.

A. Mrs. Lutz, after we had perused our—the subject we were talking about, Mrs. Lutz got up and left the office.

Q. Was Mrs. Sheldon at any time during the course of this meeting or at its close present in your office?

A. Who?

Q. Mrs. Sheldon.

A. Mrs. Sheldon? No.

Q. You are quite sure of that?

A. Yes.

(Testimony of Earl L. Bailey.) [Tr. 779]:

Q. Now, you had been instructed by Ben Sheldon

to set up a set of books pertaining to oil operations some time after your employment?

A. No, that—those records were set up prior to my employment. I just continued them.

Q. Did you keep a set of records for oil investments of Ben Sheldon, individually?

A. Yes.

Q. And you kept a set of records for oil investments of the corporation?

A. As a part of the corporation accounts.

Q. They were two separate sets of records, were they?

A. Yes, they were.

Q. You were employed by the corporation, were you? A. Yes.

Q. Did Ben Sheldon pay you personally to keep records for him?

A. As I recall, he paid ten or twenty dollars a month, [501] and I forget what it was, to keep his personal records. It was a very nominal amount.

Q. Weren't you in the process of setting up Ben Sheldon's books pertaining to oil investments at the time you were interviewed by Mrs. Lutz and Dr. Lutz?

A. Those books had been previously set up.

Q. I am referring to Ben Sheldon.

A. Ben Sheldon, yes. All of them; both sets of books.

Mr. Enright: Have we Ben Sheldon's books here, that the witness is referring to, setting up the oil investment?

Mr. Stutsman: I don't know.

Mr. Henigson: We have some books here, which you are invited to inspect.

(Thereupon a book was handed to counsel.)